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November 25, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2019AP1551-CRNM State of Wisconsin v. Mecquon J. Jones (L.C. #2016CF620)

Before Reilly, P.J., Gundrum and Davis, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Mecquon J. Jones appeals from a judgment, entered upon his no-contest pleas, convicting him on one count of first-degree reckless homicide and one count of misdemeanor theft, both as a party to a crime. Appellate counsel, Jay R. Pucek, has filed a no-merit report, pursuant to

Anders v. California, 386 U.S. 738 (1967) and WIS. STAT. RULE 809.32 (2017-18).[1] Jones has filed a response to counsel's report. Upon this court's independent review of the record as mandated by ***Anders***, counsel's report, and Jones's response, we conclude that there are no issues of arguable merit that could be pursued on appeal, and we summarily affirm the judgment.

BACKGROUND

According to the criminal complaint, City of Racine police found Thomas Borglin faced down and unresponsive in the main hallway of his home, with a series of injuries to his face, on April 11, 2016. Borglin was pronounced dead at the scene. The Milwaukee County Medical Examiner's Office determined that Borglin had died from blunt force trauma to his chest and neck area. The medical examiner also opined that Borglin's injuries were too severe to have been caused by a simple fall and were likely caused by something striking him, like a human fist or foot. Borglin's family reported that two televisions were missing from his home.

Investigation led police to Jones, Derryle Allen, and Bobby Mitton. On April 14, 2016, police received a phone call from S.T., who said she had information about Borglin's death.[2] S.T. reported that she had spoken with Mitton, who admitted to her that he had been drinking at Borglin's residence with Borglin, Allen and Jones. Mitton also told her that Jones beat Borglin up. S.T. further related that she had bought a television from Mitton on April 10, 2016, but something about it felt "off," so she returned it to Mitton on April 12, 2016.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] According to Jones, S.T. is Mitton's sister.

Allen also contacted police to offer information. He indicated that Mitton had started a physical altercation with Borglin and that after Mitton slammed Borglin to the ground, Jones began to "stomp" on Borglin's upper torso.

Mitton and Jones were detained and interviewed. Mitton said that he was with Allen near the televisions in Borglin's home when he heard an argument. He looked over and saw Jones "stomping" on Borglin, who was on the ground. Mitton said he and Allen pulled Jones off Borglin, but Jones broke free and went back to "stomping" Borglin. Mitton and Allen pulled Jones off Borglin again, then all three fled the scene.

Jones admitted that the four were at Borglin's home together, but initially said that nothing happened. Upon further questioning, Jones stated that Mitton and Borglin had gotten into an argument about Jones, although Jones could not recall how the argument had started. Jones noticed the two men were wrestling and watched Mitton slam Borglin to the ground and begin hitting him in the head. Jones said he stopped Mitton from further attacking Borglin and told Mitton they needed to leave. Jones also said he ended up on the ground with Borglin, punching Borglin everywhere he could. Jones admitted kicking Borglin, although he could not recall how many times because he was too drunk to remember. Jones further admitted that he kicked Borglin "soccer style" and "stomped him straight down" and said that he did not stop until Mitton and Allen grabbed him. Mitton and Allen gave statements about taking the televisions; Jones told police the televisions were removed to prevent the men's apprehension.

Jones was charged with first-degree intentional homicide as a party to a crime and misdemeanor theft. The circuit court conducted a ***Miranda/Goodchild*** hearing[3] and determined that Jones's statements to police were admissible. Jones subsequently agreed to resolve his case with a plea. In exchange for guilty or no-contest pleas, the State would amend the charges to first-degree reckless homicide and misdemeanor theft, both as a party to a crime. Each side would be free to argue for an appropriate sentence. The circuit court accepted Jones's pleas and sentenced him to fifty-five years' imprisonment for the homicide, with a concurrent nine months in jail for the theft. Jones appeals.

DISCUSSION

Appellate counsel identifies and discusses two potential issues in the no-merit report: whether "the circuit court err[ed] when accepting Mr. Jones' plea" and whether "the circuit court err[ed] when sentencing Mr. Jones to thirty-five years initial confinement and twenty years extended supervision" concurrent to Jones's revocation sentence. Jones discusses multiple issues in his response, primarily related to the plea, sentencing, and trial counsel's performance.

I. Constitutional Validity of the Plea

To pass constitutional muster, a plea must be knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). Here, Jones completed a plea

[3] *See* ***Miranda v. Arizona***, 384 U.S. 436, 444-45 (1966), and ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 264, 133 N.W.2d 753 (1965). A ***Miranda*** hearing is used to determine whether a defendant properly waived his or her constitutional rights before giving a statement, *see* ***State v. Woods,*** 117 Wis. 2d 701, 714-15, 345 N.W.2d 457 (1984), and a ***Goodchild*** hearing determines the voluntariness of such a statement, *see* ***Goodchild***, 27 Wis. 2d at 264-65. Our review of the record satisfies us that there is no arguably meritorious appellate issue related to the circuit court's decision at the hearing.

questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he acknowledged that his attorney had explained the elements of the offenses to him. Jury instructions for first-degree reckless homicide, party-to-a-crime liability, and theft were referenced in and submitted with the questionnaire. The questionnaire correctly acknowledged the maximum penalties Jones faced and also specified the constitutional rights he was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262, 271.

The circuit court also engaged Jones in a plea colloquy. *See* ***id.*** at 261-62. Our review of the record—including the plea questionnaire and waiver of rights form and plea hearing transcript—confirms that the circuit court complied with its duties for conducting a plea colloquy, as required by WIS. STAT. § 971.08, ***Bangert***, and ***State v. James E. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.

One of the circuit court's obligations when accepting a plea is to ensure the defendant understands the nature of the charges against him. *See* ***Bangert***, 131 Wis. 2d at 262. In his no-merit response, Jones contends that his plea was not knowing, intelligent, and voluntary because the circuit court failed to review party-to-a-crime liability with him, specifically as it relates to first-degree reckless homicide.

The plea hearing transcript reflects that the circuit court first reviewed the substantive elements of first-degree reckless homicide with Jones, then the substantive elements of theft, both of which Jones said he understood. The circuit court then noted that Jones was "accused of the theft as party to a crime" and explained:

> There are three ways to commit a crime in the State of Wisconsin. Three primary ways. One, you directly committed it. Two, you assisted another in committing it or stood by ready, willing and

> able to assist another in committing it. That's what is often called accomplice liability. Thirdly, you agreed with another that the crime should occur and then that person or another party to the agreement commits the crime. That's what is called conspirator liability. Do you understand those are the three ways of being party to a crime?

Jones acknowledged that he understood this explanation of party-to-a-crime liability.

Jones does not claim that he was unaware that the homicide was also charged as party-to-a-crime. Rather, he claims that he "neither knew nor understood what or how the party to a crime modifier and liability standard operates with first degree reckless homicide" because the circuit court did not expressly review it with him immediately after discussing the homicide elements. However, the nature of party-to-a-crime liability, as the circuit court explained it—which, again, Jones acknowledged he understood—is not crime-specific. That is, the description of party-to-a-crime provided by the circuit court was not modified in such a way that it could only apply in the context of a theft charge but instead described the concept in a way that applies equally to both of Jones's crimes. Thus, if Jones understood party-to-a-crime liability as it was explained to him as it relates to theft, he necessarily understood the concept as it applies with first-degree reckless homicide. Accordingly, our review of the record[4] satisfies us that there is

[4] The record also reflects that "PTAC" was listed for both offenses on the plea questionnaire; a single copy of the party-to-a-crime jury instruction, positioned between the two substantive jury instructions, was submitted with the questionnaire; and trial counsel acknowledged reviewing all the elements of the offenses with Jones. *See* ***State v. Bangert***, 131 Wis. 2d 246, 267-68, 389 N.W.2d 12 (1986) (describing multiple ways for circuit court to ascertain defendant's knowledge of elements of charges).

Further, while the State's theory of party-to-a-crime liability was accomplice liability, we note that to the extent that the facts in the complaint establish Jones as the principal actor in the homicide, meaning he could have been held directly liable, it would not have been necessary for the circuit court to specifically explain party-to-a-crime liability. *See* ***State v. Calvin L. Brown***, 2012 WI App 139, ¶¶12-13, 345 Wis. 2d 333, 824 N.W.2d 916.

no arguable merit to a claim that the circuit court failed to fulfill its obligations during the plea colloquy or that Jones's pleas were anything other than knowing, intelligent, and voluntary.

II. Factual Basis for the Pleas

In his no-merit response, Jones asserts that there is an insufficient factual basis for his pleas. A circuit court accepting no-contest pleas is required to "make such inquiry as satisfies it that the defendant in fact committed the crime charged." WIS. STAT. § 971.08(1)(b). However, the court need not "conduct a mini-trial … to establish that the defendant committed the crime charged beyond reasonable doubt." *See* ***State v. Black***, 2001 WI 31, ¶14, 242 Wis. 2d 126, 624 N.W.2d 363.

One of the elements of first-degree reckless homicide is that the defendant caused the death of the victim, where "cause" means that the defendant's act was a substantial factor in the death. *See* WIS JI—CRIMINAL 1020. Jones argues that he did not admit, and the circuit court did not find, "that the actions of Jones were substantial factor contributing to Borglin's death."

However, a defendant entering a no-contest plea "is not required to admit his or her guilt," and the factual basis for the plea will be supported "as long as the facts set forth in the complaint met the elements of the offense." *See* ***Black***, 242 Wis. 2d 126, ¶15. Here, the criminal complaint recites that the medical examiner concluded Borglin had died from blunt force trauma to the chest and neck, which was too severe to have been caused by a fall but could have been inflicted by a human fist or foot. Allen and Mitton both reported, and Jones admitted, "stomping" on or kicking Borglin; Jones also admitted hitting Borglin wherever he could. These facts provide an adequate factual basis for Jones's homicide plea.

One of the elements of theft is that "the defendant intentionally took and carried away movable property of another." *See* WIS JI—CRIMINAL 1441. Presumably, this is the element to which Jones is referring to when he argues that he was not "implicated in the theft of asportation of the 32" and 50" televisions … and did nothing to assist the commission of that crime[.]"[5]

"[A] factual basis for a plea exists if an inculpatory inference can be drawn from the complaint or facts admitted to by the defendant even though it may conflict with an exculpatory inference elsewhere in the record and the defendant later maintains that the exculpatory inference is the correct one." ***Black***, 242 Wis. 2d 126, ¶16. According to the criminal complaint, which included information from Jones's co-actors, Allen and Mitton put the televisions in the back seat of Allen's car. All three men got into Allen's car, and Allen drove to Jones's nearby residence, where Jones and Mitton took the smaller television out of the car and Allen drove away alone with the larger television. Jones also told police that the televisions were taken so the men could avoid apprehension. These facts permit an inculpatory inference that Jones assisted or was willing to assist in the theft of the televisions, so there is an adequate factual basis for Jones's theft plea.

Based on the foregoing, there is no arguable merit to a claim that there was an insufficient factual basis for either of Jones's pleas.

[5] Asportation is "[t]he removal of things from one place to another[; t]he carrying away of goods[.]" *See* ***State v. Grady***, 93 Wis. 2d 1, 6, 286 N.W.2d 607 (Ct. App. 1999) (citation omitted).

III. Ineffective Assistance of Counsel

A. The Medical Examiner's Findings

Jones asserts that trial counsel failed to advise him that the medical examiner "provided testimonial evidence that strangulation and post traumatic apnea due to alcohol concentration in the victim's blood exceeded .3 and were substantial contributing factors in the victim's death," thereby rendering his pleas unknowing. Jones also complains that trial counsel "failed to hire an independent expert to review [the] Medical Examiner's report and findings at autopsy."

Jones appears to be claiming that trial counsel was ineffective for not pursuing these "exculpatory" lines of evidence. There are two elements to a claim of ineffective assistance of counsel: deficient performance by counsel and prejudice from that performance. *See* ***State v. Mayo***, 2007 WI 78, ¶60, 301 Wis. 2d 642, 734 N.W.2d 115. We need not address both elements if the defendant cannot make a sufficient showing on one of them. *See* ***id.***, ¶61.

The "testimonial evidence" to which Jones refers appears to be the medical examiner's testimony at Mitton's trial. However, Jones entered his pleas in October 2017 and was sentenced in March 2018; Mitton's trial did not begin until August 2018. Thus, trial counsel could not have advised Jones of the medical examiner's testimony prior to the entry of Jones's plea, and counsel is not deficient for failing to perform the impossible.

Still, the criminal complaint recites the medical examiner's findings that Borglin had a "fracture of the hyoid bone" and that he "had aspiration of blood, which means that some blood went down his throat, which caused difficulties breathing," which are findings that roughly correspond to the substance of the medical examiner's testimony. Thus, we have considered

whether there is any arguable merit to a claim that trial counsel was ineffective for not hiring an independent expert to review the medical examiner's findings, or whether postconviction counsel was ineffective for not bringing some sort of postconviction motion in light of the medical examiner's testimony at Mitton's trial. *See* ***State ex rel. Panama v. Hepp***, 2008 WI App 146, ¶27, 314 Wis. 2d 112, 758 N.W.2d 806.

Jones mischaracterizes the medical examiner's testimony.[6] At Mitton's trial, the medical examiner testified that Borglin had a fracture to his hyoid bone, which was an indication of pressure applied to the neck. The State asked if that was "pressure as if someone was going to strangle another person," to which the answer was, "Yes." The State then asked if there were "any other indications of strangulation," and the medical examiner responded that there were "indications of pressure applied to the neck." The medical examiner did not, however, testify that Borglin had been strangled or that the cause of death was strangulation.

The medical examiner also testified that there were "two mechanisms of death"—the pressure applied to Borglin's neck associated with asphyxia, and "blunt force injury to the face and head and alcohol intoxication." On redirect examination, she explained:

> [P]eople who are intoxicated and sustain head trauma, especially face trauma, they can develop what is called post traumatic apnea. It means where they stop breathing. They collapse and die…. It's very likely that he developed apnea. This apnea was due to contusion and alcohol intoxication.

The medical examiner further testified that while it was "possible" that alcohol alone caused Borglin's death, it was not likely given that Borglin's history of extensive alcohol use; even

[6] Jones provided a portion of the transcript as an attachment to his no-merit response.

though Borglin had an estimated a blood-alcohol concentration of 0.3, the blood-alcohol concentration in cases where the medical examiner certifies acute alcohol intoxication as a cause of death generally exceeds 0.4. Thus, the medical examiner testified, "the blunt force trauma and the injuries to his neck and head caused [Borglin's] death," although the alcohol intoxication made him "more vulnerable." As postconviction counsel explained to Jones in a letter, "alcohol intoxication made the victim more vulnerable to the blunt force trauma, but the blunt force trauma was still a substantial factor in bringing about the victim's death…. [T]he acts of the defendant do not need to be the only factor in bringing about the death[.]"

Based on the foregoing, there is no basis for claiming prejudice from postconviction counsel's failure to seek relief based on the medical examiner's testimony from Mitton's trial.[7] Further, though Jones complains that trial counsel should have found an independent expert to review the medical examiner's findings, he does not identify any such expert willing to testify to contrary conclusions, nor what they might say and how it would benefit him. Accordingly, there are no arguably meritorious claims of ineffective assistance of either trial or postconviction counsel relating to the medical examiner's findings or testimony from Mitton's trial.

B. Imperfect Self-Defense

Jones also asserts that trial counsel was ineffective for not advising him of:

> the Affirmative Defense related to imperfect self-defense when the evidence shows that the victim, while engaged in a physical altercation with Bobby Mitton, was trying [to] commit serious bodily injury against Mitton when Jones intervened to prevent the

[7] In addition, a valid guilty or no-contest plea waives nonjurisdictional defects or defenses. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

> imminent danger of death or great bodily harm used an excessive amount of force that resulted in the victim's death.

Imperfect self-defense is a mitigating factor for only one crime: first-degree intentional homicide. *See* ***State v. Head***, 2002 WI 99, ¶87, 255 Wis. 2d 194, 648 N.W.2d 413. When imperfect self-defense is successfully invoked, a charge of first-degree intentional homicide becomes a conviction for second-degree intentional homicide. *See* ***id.***, ¶88. However, second-degree intentional homicide is a Class B felony, which is the same classification as the first-degree reckless homicide of which Jones was convicted. *See* WIS. STAT. §§ 940.02(1), 940.05(1). Thus, even assuming without deciding that trial counsel was deficient for not discussing imperfect self-defense with Jones as a defense to the original charge of first-degree homicide, there is no arguable merit to any claim ineffective assistance of counsel because there is no demonstrable prejudice.

IV. Sentencing Discretion

The other issue that appellate counsel discusses in the no-merit report is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several other factors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be

given to each factor is committed to the circuit court's discretion. *See* ***id.*** Our review of the record confirms that the circuit court appropriately considered relevant sentencing objectives and factors, and we agree with counsel's analysis as set forth in the no-merit report.

In his no-merit response, Jones argues that under the Eighth Amendment proportionality test set forth in ***Solem v. Helm***, 463 U.S. 277, 292 (1983), his sentence is "excessive, unduly harsh and unconscionable." ***Solem*** recommends that courts conducting a proportionality analysis consider three objective factors: the gravity of the offense and the harshness of the penalty, the sentences imposed on other criminals in the same jurisdiction, and the sentences imposed for commission of the same crime in other jurisdictions. *See* ***id.***

Jones's invocation of ***Solem*** is inapt; Solem was facing a sentence of life without parole for a seventh non-violent felony. *See* ***id.*** at 279. Jones's record includes at least nine prior convictions, three of which were felonies, and he is now responsible for taking another person's life, but he offers no explanation of how his sentence is disproportionate. The concurrent sentences Jones received totaling fifty-five years' imprisonment are within the sixty-year and nine-month range authorized by law. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. Under the circumstances, the sentences are not so excessive so as to shock the public's sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975); ***Solem***, 463 U.S. at 289-90 ("[S]uccessful challenges to the proportionality of particular sentences [will be] exceedingly rare[.]" (citation and emphasis omitted)).

Jones also complains there was insufficient evidence of Borglin's "character and violent proclivities" introduced at sentencing as a mitigating circumstance. However, the record reflects that the circuit court was aware of Jones's claim that Borglin was fighting with and refused to

release Mitton. To the extent Jones is complaining that the circuit court did not consider those circumstances to be mitigating or that the circuit court did not give those allegations any particular weight, such is the circuit court's prerogative.

Jones also complains that the circuit court improperly relied on expert evidence that was not of record but simply stated by the circuit court at sentencing regarding the dynamics of mob mentality.[8] However, our review of the circuit court's comments reveals that the circuit court was simply articulating its reasons, based on everyday experience, for considering it to be an aggravating factor that Borglin was killed by a group of perpetrators working together rather than a single individual.

Our independent review of the record reveals no other potential issues of arguable merit.[9]

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

[8] The circuit court commented, in relevant part:

> Group activity is dangerous in and of itself because groups are capable of doing greater harm than a[n] individual. But also because the behavior of the group tends to be more criminal in nature than that of individuals. A group enables and modifies the characteristics of the members of the group. The group sinks to the level of the lowest member of the group. It ends to exercise the restraining of the most reckless individual in the group. The judgment of the member who as the least judgment and the morality of the least moral member.

[9] Any issues that Jones may have intended to raise, but which are not specifically identified and discussed with specificity herein, are deemed to lack sufficient merit to warrant individual attention. *See* ***Libertarian Party of Wis. v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996).

IT IS FURTHER ORDERED that Attorney Jay R. Pucek is relieved of further representation of Jones in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition will not be published.

Sheila T. Reiff
Clerk of Court of Appeals